Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

AMADOR CESARIO RODRIGUEZ,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Fourteenth Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

NUMBER 1

WAS PETITIONER DENIED DUE PROCESS BY THE TRIAL COURT DENYING A SHORT CONTINUANCE TO SECURE HIS ONLY EYEWITNESS TO TESTIFY REGARDING SELF-DEFENSE?

NUMBER 2

WAS PETITIONER DENIED DUE PROCESS BY THE TRIAL COURT DENYING HIS MOTION FOR NEW TRIAL WHEN IT WAS SHOWN THAT HIS ONLY EYE-WITNESS REGARDING SELF-DEFENSE WAS KEPT FROM COURT BY FRAUD?

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OPINION BELOW

Petitioner, Amador Cesario Rodriguez, files this petition for writ of certiorari regarding the judgment and opinion of the Court of Appeals for the Fourteenth Judicial District of Texas (hereafter "court of appeals") entered on May 11, 2000. The opinion was published and is attached hereto as appendix 3. *See Rodriguez v. State*, 21 S.W.3d 562 (Tex. App. – Houston [14th Dist.] 2000, pet. refused). Petitioner timely filed a petition for discretionary review in the Texas Court of Criminal Appeals, the highest state court of review of criminal cases, which was refused without opinion. (App. 8 and 9).

JURISDICTION

Petitioner was indicted for murder. A jury trial was conducted. Petitioner was found guilty, and sentenced, by the jury, to 30 years in prison. The judgment was signed on August 7, 1997.

On August 5, 1999, the court of appeals issued its first opinion affirming the judgment and sentence. (App. 1). On September 1, 1999, petitioner filed his first motion for rehearing contemporaneously with a motion for extension of time to file the motion, which was granted. (App. 4). On December 16, 1999, the court of appeals issued its second opinion affirming the judgment and substituting its first opinion. (App. 2). On January 18, 2000, petitioner filed his second motion for rehearing contemporaneously with a motion for extension of time to file the motion, which was granted. (App. 5). On May 11, 1999, the court of appeals issued its third opinion

affirming the judgment and substituting its second opinion. (App. 3). On June 12, 2000, petitioner filed his third motion for rehearing contemporaneously with a motion for extension of time to file the motion, which was granted. (App. 6). On July 6, 2000, the court of appeals overruled petitioner's third motion for rehearing, without opinion. (App. 7). Petitioner timely filed a petition for discretionary review in the Texas Court of Criminal Appeals, which was refused on November 22, 2000. (App. 8, 9, and 10).

Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the refusal of the petition for discretionary review.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a). Specifically, the court of appeals affirmed the judgment and sentence of the trial court in spite of petitioner being denied due process. Although petitioner invoked the jurisdiction of the Texas Court of Criminal Appeals, that court declined to review the judgment of the lower courts. Accordingly, the court of appeals that issued the judgment and opinion is the highest court in which a decision could be had.

CONSTITITIONAL PROVISIONS INVOLVED

The following Constitutional provisions are involved in this case:

The Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. Amend. V.

The Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S. CONST. Amend. VI.

The Fourteenth Amendment, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws. U.S. CONST. Amend. XIV § 1.

STATUTES CODES AND RULES INVOLVED

The following Texas statutes are involved in this case:

Rule 21.3(e) of the Texas Rules of Appellate Procedure

The defendant must be granted a new trial for any of the following reasons:

(e) when a material defense witness has been kept from court by force, threats, or fraud, or when evidence tending to establish the defendant's innocence has been intentionally destroyed or withheld, thus preventing its production at trial. Tex. R. App. Pro. 21.3(e).

Article 29.13 of the Texas Rules of Criminal Procedure

A continuance or postponement may be granted on the motion of the State of defendant after the trial has begun, when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had.

STATEMENT OF THE CASE

1. Material facts.

Petitioner was indicted for the murder of Charles Haywood. (CR 5; RN Vol. 1, p. 6-7).[1] Petitioner's defense was self-defense. (RN Vol. 1, p. 17). The State called eleven witnesses. Petitioner testified on his own behalf and attempted to call his main witness, Candy Pequeno, who, through no fault of his own, and to his lawyer's complete surprise, was not available to testify on Thursday afternoon, the day she was needed. Ms. Pequeno would have been available the next Monday, but the trial court refused to continue the case for this short period of time. In that regard, petitioner's lawyer filed a written motion for continuance to continue the case from Thursday afternoon until Monday morning to bring Ms. Pequeno to court. (RN Vol. 3, p. 200-206). The prosecutor agreed that Ms. Pequeno was an important witness. (RN Vol. 3, p. 179).

Ms. Pequeno had always cooperated with petitioner's lawyer. (RN Vol. 3, p. 200-206). She had appeared to testify at the grand jury. She had come to all three trial settings before the case was finally tried. She told petitioner and his lawyer that a subpoena was unnecessary. (RN Vol. 3, p. 201). It was also clear from her actions that she was always available and willing to testify. (RN Vol. 3, p. 201). When petitioner's lawyer first learned Ms. Pequeno might not appear he had a subpoena issued. (RN Vol. 3, p. 202). Also, it was clear there was a good

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[1] "CR" herein means Clerk's Record; "RN" means Reporter's Notes. *See*, Tex. R. App. P. 34.5 and 34.6.

possibility Ms. Pequeno could be located by Monday morning because trial counsel's investigator had spoken with her brother. (RN Vol. 3, p. 203). In fact, she was located and signed an affidavit (which was admitted into evidence during the hearing on the motion for new trial) stating she intentionally hid from petitioner knowing he believed she would appear in court. Specifically, she stated in the affidavit:

> I appeared at the 232nd Judicial District Court in Houston several times before the case was tried to testify on behalf of Amador. Each time I appeared the case was reset. At the times that I appeared to testify I resided at 209 Tabor in Pasadena, Texas. This is where I had told Amador and his Lawyer, Ricardo Rodriguez that I lived. However, when the case finally went to trial I had moved and I did not tell Amador or his lawyer where I moved to. I did not tell them because I did not want them to know. I knew that the case was going to be called for trial again in November, 1997. I told Amador and his lawyer that I would be there. When I did not appear at the November trial setting there was no way for Amador or his lawyer to know because I had always showed up when I was asked and I did not tell them or do anything that would cause anyone to believe that I was not going to show up in November. Also, there was no way they could find me because I had moved without telling them where I had moved to. At that time I had a pager. I did not answer the pager when I was called by Amador or his lawyer because my husband had thrown the pager away.

(CR 109-111; RN Vol. 5; Appellant's Brief, app. 2).

Additionally, Ms. Pequeno testified at the hearing on the motion for new trial (her last name had changed to Cron). She said she was in petitioner's car in a Jojo's restaurant parking lot on the night in question. (RN Vol. 5, p. 5). The car driven by the victim "backed up on us and then turned around and followed us around the Jojo's parking lot." (RN Vol. 5, p. 5). The occupants of the car were screaming at them and causing her to become frightened. (RN Vol. 5, p. 6). A passenger in the car had a gun and it appeared they were going to shoot at them. (RN Vol. 5, p. 7). Petitioner had done nothing to provoke the people in the car. (RN Vol. 5, p. 7). It appeared petitioner was in fear of his life, and it was clear he believed he must act in self-defense. (RN Vol. 5, p. 7).

When Ms. Pequeno appeared at the previous trial settings to testify, the case was not reached. (RN Vol. 5, p. 8). At the last setting before trial she told petitioner and her lawyer she would appear to testify at the next trial setting. (RN Vol. 5, p. 8-9). She knew the case was set for trial at the time it actually went to trial. (RN vol. 5, p. 9). She moved and changed her telephone number shortly before the trial setting when the case finally went to trial. (RN Vol. 5, p. 9-10). However, she did not tell petitioner, his attorney, or anyone else related to petitioner's defense that she made the changes. (RN Vol. 5, p. 10). She said there was no way petitioner or his lawyer could have known how to get in touch with her. (RN Vol. 5, p. 10).

Although the trial court denied petitioner's motion for a short continuance, the trial court granted his request to read Ms. Pequeno's grand jury testimony to the jury. (RN Vol. 4, p. 3-37). This is important because, under Texas law, to allow grand jury testimony the trial court

must find that petitioner "has been unable to procure [the witness's] attendance or testimony by process or other reasonable means." Tex. R. Crim. Evid. 804(a)(5); *Reyes v. State*, 845 S.W.2d 328, 331 (Tex. App. – El Paso 1992, no pet.). The test of whether sufficient efforts were made to secure the presence of the witness "has been described as 'good faith efforts undertaken prior to trial to locate and present that witness.' " *Reyes*, 845 S.W.2d at 331.

In resolving the motions for continuance and new trial, the court of appeals stated trial counsel failed "to take the necessary steps to secure the attendance of a key witness." *See* Op. page 4, and page 6, note 3. This holding ignores and is contrary to the trial court's ruling that the grand jury testimony of Ms. Pequeno was admissible because trial counsel *did* take the necessary steps to secure the attendance of Ms. Pequeno. *See, Reyes*, 845 S.W.2d at 331. These discrepancies are relevant, not simply because the court of appeals made erroneous factual findings, but as another example, in addition to the conflicting cases discussed below, of why a constitutional standard is needed to establish the perimeters for a court to exercise its discretion to grant or deny a motion for continuance when a crucial witness is missing.

2. Federal questions raised in lower courts.

Petitioner raised the federal questions stated herein at all stages of his prosecution in the lower courts. Namely, he challenged the due process violations at the trial court by filing a motion for continuance and a motion for new trial. (RN Vol. 3, pp. 200-206; CR 63-66, 104-112). The trial court denied both motions. In his first

brief filed in the court of appeals, petitioner challenged the due process violations by the trial court's denial of the motion for continuance and motion for new trial that prevented him from presenting his main witness to the jury. *See*, Appellant's Brief, page 28-35. The court of appeals' first and second opinions were replaced by its third and final opinion, which petitioner challenges with this petition. (App. 1, 2, and 3.) In its third opinion, the court of appeals discussed the constitutional questions raised by petitioner. (App. 3). In this regard, the court of appeals wrote:

> In his third and fourth points of error, appellant contends the trial court's denial of his motion for continuance and motion for new trial violated his right to . . . due process under the federal constitution. According to appellant, the "basic notions of fairness were violated by the trial court refusing to allow appellant to present the most important and crucial evidence to his sole argument of self-defense." Op. p. 8.

In its final opinion, the court of appeals concluded petitioner properly preserved the due process arguments at trial, addressed the merits of the constitutional arguments, but nevertheless affirmed the judgment of the trial court.

Petitioner timely raised the due process issues in the Texas Court of Criminal Appeals by filing a petition for discretionary review. *See*, Petition for Discretionary Review, pp. 9-11. That court refused the petition.

REASONS FOR GRANTING THE WRIT

1. U.S. Supreme Court cases regarding continuances in criminal trials.

The lead U.S. Supreme Court case regarding the right of the accused to present witnesses at trial states:

> The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

This right to present witnesses is secured by the compulsory process clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. *See id.*; *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972). These rights are put at issue when the accused moves for a continuance to secure the presence of a missing witness. This is a common occurrence in federal and state criminal prosecutions throughout the United States. In this context, the oft stated rule is that the "granting or denial of a motion for continuance is vested in the sound discretion of the trial court." *Cf. Rodriguez*, 21 S.W.3d at 565. This general statement is found in hundreds of cases dealing with motions for continuance in criminal cases. However, such a generality is of little or

no guidance when applying the specific facts of a case to the issue of due process and the right to present defense witnesses. Regarding these general statements of the standard of review of the denial of a motion for continuance, the U.S. Supreme Court has stated:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 850, 11 L.Ed.2d 921 (1964) (citations omitted).

Regarding claims of due process violations, the U.S. Supreme Court has said the following:

> [It is] clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.

United States v. Valenzuela-Bernal, 458 U.S. 858, 869, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) (quoting *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)).

This petition should be granted to articulate a constitutional standard to be applied in the context of continuances where the accused's witnesses are missing and due process is implicated. In that regard, the lower appellate court's have taken greatly different paths when deciding factually similar scenarios as those in this case, because of the lack of a standard constitutional guideline. When reaching their conclusions, no consistent standard is applied, the decision, therefore, being left to the particular creativity (or lack thereof) of the judges hearing the issue. The following are some of the better examples, where the courts did more than just perfunctorily state that the motion for continuance is left to the sound discretion of the trial judge. In spite of the following courts' attempts at analysis, the methodology and outcomes are wide-ranging and inconsistent.

2. Federal cases holding a constitutional violation.

On habeas corpus review of a robbery conviction, the 11th Circuit held that the trial court erred in denying a motion for continuance to secure a police officer who the defendant believed would testify the defendant was not at the scene of the crime at the time in question. *Dickerson v. State of Alabama*, 667 F.2d 1364, 1369-1370 (11th Cir. 1982). The defendant called three other witnesses that testified to the same thing. *Id*. Regarding the standard of review, the court stated the following should be considered:

> The diligence of the defense in interviewing witnesses and procuring their presence, the probability of procuring their testimony within a

> reasonable time, the specificity with which the defense is able to describe their expected knowledge or testimony, the degree to which such testimony is expected to be favorable to the accused, and the unique or cumulative nature of the testimony.

Id. at 1370.

On appeal of a conviction for violating the "White Slave Act", the 4th Circuit held that, although the defendant waited until the day before trial, under the circumstances, the trial court erred in denying the defendant's motion for continuance to secure his witnesses who were located in three different states. *Younge v. United States*, 223 F. 941, 943 (4th Cir. 1915). The court did not state a specific standard of review but emphasized that diligence on the part of the defendant is important. *Id.* at 195.

3. Federal cases holding no constitutional violation.

On appeal of a narcotics conviction, the 8th Circuit held that the trial court did not err in denying a motion for continuance to secure the presence of three alibi witnesses because of defense counsel's delay in requesting the continuance. *United States v. Tran*, 16 F.3d 897, 905 (8th Cir. 1994). Additionally, the court factored in the overwhelming evidence of the defendant's guilt during the period that was not addressed by the alibi witnesses. *Id.* at 906. Regarding a standard of review, the court stated:

> The district court must balance a number of considerations in determining whether or not to grant a continuance and must be afforded substantial discretion. Denial of a continuance is

> reversible error only if the judge clearly abused this discretion.

Id. at 905 (citations omitted).

The court went on to state a standard of review regarding the right to compulsory process saying:

> In order to be entitled to compulsory process, the defendant must demonstrate that a witness' "testimony would have been both material and favorable to his [or her] defense."

Id. at 906 (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982)).

4. State cases holding a constitutional violation.

On appeal of a conviction for armed voluntary manslaughter and other offenses, the District of Columbia Court of Appeals held that the trial court erred in denying a motion for continuance where, during trial, the defendant asked the court for a short continuance to bring an eyewitness from jail to testify. *Daley v. United States*, 739 A.2d 814, 817 (D.C. 1999). In that regard, the court stated:

> Relevant factors in determining whether there has been an abuse of discretion include the reasons for the request for a continuance, the prejudice resulting from its denial, the party's diligence in seeking relief, any lack of good faith, and prejudice to the opposing party.

Id.

On appeal of a rape of a minor conviction after a bench trial, the Montana Supreme Court held the trial

court erred in denying a motion for continuance made during trial to secure two minor witnesses who were present at the home where the alleged crime took place. *State v. Timblin*, 834 P.2d 927, 929 (Mont. 1992) (dissenting opinion filed). The defendant secured subpoenas after the trial began. *Id.* Regarding the standard of review, the court cited three criteria to be considered:

> (1) The nature and extent the government conduct contributed to the unavailability of the witness; (2) The importance of the evidence to the defendant's case; and (3) The defendant's diligence in exercising his Sixth Amendment rights.

Id. at 928.

On appeal of a murder conviction, the Alaska Supreme Court held the trial court erred in denying a motion for a one day continuance made during trial to secure a police officer witness to testify about a circumstantial question regarding a vehicle he had seen. *Salazar v. State*, 559 P.2d 66, 72-73 (Alaska 1976) (dissenting opinion filed). Regarding the standard of review, the court said the following factors should be considered:

> (1) whether the testimony is material to the case; (2) whether the testimony can be elicited from another source; (3) whether the testimony is cumulative; (4) probability of securing the absent witness in a reasonable time; (5) whether the requesting party was diligent and acting in good faith; (6) the inconvenience to the court and/or others; and (7) the likelihood that the testimony would have affected the jury's verdict.

Id. at 72.

On appeal of an assault conviction, the Washington Supreme Court held the trial court erred in denying a motion for continuance for a short time during trial to locate three subpoenaed witnesses present at the club where the alleged assault took place. *State v. Edwards*, 412 P.2d 747, 751 (Wash. 1996) (dissenting opinion filed). The closest the court came to stating a standard of review was by saying "good faith is, of course, an essential ingredient to any application for a recess, postponement or continuance. . . . " *Id.* at 753.

On habeas corpus appeal of a conviction for theft, a Colorado Court of Appeals held that the trial court erred in denying a motion for continuance made on the Friday before trial, which was to begin on Tuesday, where "defense counsel learned that key alibi witnesses who had been scheduled to testify for the defense had unexpectedly proved unable, for financial reasons, to travel from the homes in California to Colorado for the trial." *People v. McCabe*, 546 P.2d 1289, 1290 (Colo. Ct. App. 1976). As a standard of review, the court stated:

> While the decision to grant or deny a motion for a continuance is one resting within the sound discretion of the trial court, and while its ruling will not be disturbed without a showing that such discretion has been abused, an appellate court, in reviewing such a decision, must consider the totality of the circumstances surrounding the request as reflected by the record.

Id. (citations omitted).

The court also pointed out that "the testimony of the alibi witnesses would, if they testified as represented to

the trial court and if their testimony were believed, establish the innocence of defendant." *Id.* at 1291.

See also Jennings v. Superior Court of Contra Costa County, 428 P.2d 304, 310 (Cal. 1967).

5. State cases holding no constitutional violation.

On appeal of a sale of narcotics conviction, the Connecticut Supreme Court held the trial court did not err in denying the defendant's motion for continuance where the defendant told his lawyer, the day before trial, he "had received new information in a telephone conversation the previous evening with people in Hampton, Virginia, and that a specific person would testify as to his presence in Hampton, at or shortly after the crime was alleged to have occurred." *State v. Bethea*, 355 A.2d 6, 9 (Conn. 1974). The circumstances and timing of the motion and the vagueness of the "person" were discussed by the court, but no standard of review was articulated. *Id.*

On appeal of a narcotics conviction the Washington Supreme Court affirmed (after the court of appeals reversed) holding the trial court did not err in denying the defendant's motion for continuance prior to trial to secure a witness who the defendant's counsel said would contradict a state witness' "testimony as to any participation by the defendant in the sale of the [narcotics]." *State v. Eller*, 524 P.2d 242, 245 (Wash. 1974). Regarding the standard of review, the court said:

> continuances and compulsory process in criminal cases involve such disparate elements as surprise, diligence, materiality, redundancy, due

> process, and the maintenance of orderly procedures; and that this court leaves the decision largely within the discretion of the trial court, to be disturbed only upon a showing that the accused has been prejudiced and/or that the result of the trial would likely have been different had the continuance not been denied.

Id. at 246.

On appeal of a burglary and fraudulent use of credit card conviction, the Alabama Court of Criminal Appeals held the trial court did not err in denying the defendant's motion for continuance made during trial to secure a codefendant. The defendant had already been granted a seven day continuance to locate the witnesses and did not show due diligence in attempting to ascertain their whereabouts. *Bates v. State*, 600 So.2d 411, 413-414 (Ala. 1992). Regarding the standard of review, the court said:

> A trial court should grant a motion for continuance to enable the accused to obtain a witness if the appellant shows the following: (1) that the expected evidence is material and competent; (2) that there is a probability that the evidence will be forthcoming if the case is continued; *and* (3) the moving party exercised due diligence to secure the evidence.

Id.

See also State v. Lewis, 171 S.E.2d 793 (N.C. Ct. App. 1970); *Hainesworth v. State*, 262 A.2d 328 (Md. Ct. Spec. App. 1970); *Nichols v. State*, 252 A.2d 499 (Md. Ct. Spec. App. 1969); *Clark v. State*, 250 A.2d 317 (Md. Ct. Spec. App. 1969).

6. Discussion.

Most cases addressing a motion for continuance do not articulate a standard of review other than the rhetorical "granting or denial of a motion for continuance is vested in the discretion of the trial court." *Cf. Christian v. State*, 536 S.E. 2d 600, 602 (Ga. Ct. App. 2000); *Harveston v. State*, 742 So.2d 1163, 1169 (Miss. Ct. App. 1999); *State v. Downen*, 3 S.W.3d 434, 438 (Mo. Ct. App. S.D. 1999); *State v. Root*, 987 P.2d 1140, 1141 (Mont. 1999); *State v. Short*, 769 So.2d 823, 830 (La. Ct. App. 5 Cir. 2000). Those cases typically state the particular facts developed in the trial court and reach a conclusion built around little or no analytical framework. This unexceptable and widespread practice should be addressed by this Court because of the important issue as hand – due process in motions for continuance when a witness is missing – affecting a large number of criminal prosecutions through out the United States. The lower courts need this Court to speak on this issue because there is no authoritative case on point. Many of the cases cited above have articulated or attempted to articulate different standards in this context. The issue has percolated long enough in the lower courts. When looking for a firm analytical authority one finds a myriad of possibilities (and, of course, the sea of cases stating the rote discretion-of-the-trial-court credo). Given this lack of guidance, certainly the trial courts, having much less time to consider the issue than the appellate courts, are left with nothing but their own instincts and latent prejudices in reaching a conclusion.

Some factors relevant to the issue of granting or denying a motion for continuance when a witness is missing during trial are the following:

- Judicial expeditiousness and the length of the delay sought;
- Reasons for the delay and diligence on the accused's part;
- Prejudice to the accused;
- The materiality or importance of the missing witness to the accused's defense;
- The strength of the prosecution's case;
- The likelihood the missing witness will be found;
- Government's role in the reason for the unavailability of the witness;
- Whether the testimony is cumulative.

Considering each of these factors in petitioner's case, all but one – prosecutor's fault – weigh in favor of his belief he was denied due process of law when the motions for continuance and new trial were denied. In that regard, a very short continuance was requested, therefore the trial court's calendar would be minimally affected; petitioner had no reason to know that the key witness was not going to appear as she had always done before and he issued a subpoena immediately upon becoming aware of a problem, therefore there was diligence on the part of petitioner; the witness defrauded petitioner by promising she would be there and then hid at the time of trial, therefore petitioner was not at fault for the need for continuance; the missing witness was his

only witness on a hotly disputed issue of self defense, therefore the prejudice to petitioner and the materiality of the witness was great; the case turned on whether the jury believed petitioner's defense that the victims had pulled a gun on petitioner, therefore the prosecution's case was weak; other than the missing witness petitioner was the only other person to testify on the self defense issue, therefore the testimony was not cumulative.

Additionally, it is relevant that the Texas law provides that a motion for new trial "must be granted . . . when a material defense witness has been kept from court by . . . fraud. . . . " Tex. R. App. P. 21.3(e). In that regard, the court of appeals concluded petitioner's due process was not violated by denial of the motions for continuance and new trial because "the trial court gave [petitioner] the opportunity to present his defense through Ms. Pequeno's grand jury testimony". Op. p. 9. The court of appeals also stated that:

> In any event, the notice and opportunity to be heard at the hearings for [petitioner's] motion for continuance and motion for new trial were sufficient procedural safeguards to protect [petitioner's] liberty interest.

Op. p. 10. This analysis makes little practical sense as far as dealing with the issue of a missing witness at trial. The point being that petitioner's right to due process was violated by not being granted a short continuance during trial and a new trial afterwards because of the circumstances surrounding his only defense witness being kept from court.

Finally, the lack of a coherent authority stating the analytical basis in this context leads to confusing resolutions of cases such as what the court of appeals did here regarding the grand jury testimony. The court of appeals concluded that trial counsel *did not* "take the necessary steps to secure the attendance of a key witness." *See* Op. page 4, and page 6, note 3. Yet, the trial court allowed the grand jury testimony of Ms. Pequeno to be read to the jury because trial counsel *did* take the necessary steps to secure the attendance of Ms. Pequeno. *See, Reyes,* 845 S.W.2d at 331. This case is not an isolated anomaly. It exemplifies why a constitutional standard from the U.S. Supreme Court is needed to establish the analytical perimeters for rulings on motions for continuance when a crucial witness is missing. The cases cited herein are just a few examples of how the lower court's deal with this issue. The end result is a nationwide mosaic of non-uniformity and inconsistent results over the most fundamental of legal principals: Due process in criminal prosecutions.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX 1

Affirmed and Opinion filed August 5, 1999

In The
Fourteenth Court of Appeals

NO. 14-97-01292-CR

AMADOR CESARIO RODRIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 734,893

OPINION

This is an appeal of a murder case tried to a jury. Appellant, Amador Cesario Rodriguez, complains that the trial court erred in denying his motion for continuance and motion for new trial, both of which were based on the failure of a key but unsubpoenaed witness to appear at trial. We affirm.

Background Facts

On the evening of October 5, 1996, appellant went to a Houston nightclub with a friend, where he met Candy Pequeno and Monica Garza. Appellant left the club alone around 1:45 a.m. and proceeded to his car, where he saw Ms. Pequeno and Ms. Garza standing nearby and agreed to give them a ride to their car, which was in a restaurant parking lot across the street. After the three of them

arrived by car in the restaurant's parking lot, appellant began arguing with the occupants of a Red Escort, driven by the complainant, Charles Haywood. In Mr. Haywood's car were his friends, Jermaine and Maria McFadden, who were in the back seat, and Eddie Kelly, who was in the front passenger seat. The parking lot argument eventually escalated to the point that appellant pulled out a twelve gauge shotgun, which he kept in the car, and fired at Mr. Haywood's car. The shot killed Mr. Haywood and injured Mr. McFadden. After the shooting, appellant fled the scene. Shortly thereafter, the Houston police arrested him and he was indicted for murder.

At trial, the appellant claimed that the passengers of Mr. Haywood's car were waving a gun, prompting him to shoot in self-defense. All three of the passengers in Mr. Haywood's car denied that any of them had a gun that night. To establish his defense, appellant relied on his own testimony. He also intended to present the live testimony of Ms. Pequeno, one of the passengers in his car the night of the shooting, who earlier testified before the grand jury that she saw the occupants of the Red Escort waving a gun at appellant's car. Ms. Pequeno cooperated with appellant's counsel in pretrial proceedings and had agreed to testify for appellant at trial. She demonstrated reliability by appearing for all three previous trial settings. When the trial began, however, Ms. Pequeno was nowhere to be found. Appellant, relying on Ms. Pequeno to appear voluntarily, did not arrange for a subpoena to compel her attendance at trial.

On the second day of the trial, which was a Tuesday, Ms. Pequeno still had not appeared, nor had appellant determined her whereabouts. At that point, appellant's

counsel secured a subpoena for her attendance at trial, but was unable to locate her. Following appellant's testimony on Thursday of the same week, counsel for the appellant moved for a continuance until the following Monday, stating that although they had not located Ms. Pequeno, they had made contact with her brother who was helping them look for her. The trial court denied appellant's motion for continuance, but gave him the option of reopening his case if he located Ms. Pequeno by the next morning. In addition, the trial court allowed appellant, over the State's objection, to read to the jury the testimony that Ms. Pequeno had given before the grand jury shortly after the shooting. By Friday morning, appellant still could not produce Ms. Pequeno and therefore presented her grand jury testimony to the jury.

The jury found appellant guilty of murder and sentenced him to thirty years confinement. After the trial was over, appellant finally located Ms. Pequeno. Appellant then moved for a new trial, arguing that by denying the motion for continuance, the trial court deprived him the opportunity to put on favorable testimony from a key witness which may have led to a different result. The trial court denied the motion for new trial and this appeal followed. Appellant now asserts that the trial court abused its discretion by denying his motion for continuance and motion for new trial.

Motion for Continuance

The Code of Criminal Procedure provides that a continuance may be granted "when it is made to appear to the satisfaction of the court that by some unexpected

occurrence since the trial began, *which no reasonable diligence could have anticipated,* the applicant is so taken by surprise that a fair trial cannot be had." Tex. Code Crim. Proc. Ann. Art. 29.13 (Vernon 1989) (emphasis added). The granting or denial of a motion for continuance is vested in the sound discretion of the trial court. *See Duhamel v. State,* 717 S.W.2d 80, 83 (Tex. Crim. App. 1986). When reviewing the trial court's denial of a motion for continuance, we examine the circumstances presented to the trial court and determine whether it abused its discretion in denying the motion. Where the continuance is requested because of a missing witness, "[i]f the evidence does not indicate a probability that the witness can be secured by a postponement, or if it appears that a continuance due to the absence of the witness would delay the trial indefinitely, the motion may be properly denied." *Varela v. State,* 561 S.W.2d 186, 191 (Tex. Crim. App. 1978).

The record reflects that at the time the appellant requested the continuance, he had no knowledge of the whereabouts of Ms. Pequeno. In fact, the appellant informed the trial court that even Ms. Pequeno's brother did not know where she was, but that he would try to help find her. Appellant argues that Ms. Pequeno assured him that she would be available for trial and that a subpoena was unnecessary. Nevertheless, appellant must be held ultimately responsible for his failure to secure a subpoena for a witness as important to his case as Ms. Pequeno, even if she had proved reliable and cooperative in the past. Given appellant's failure to subpoena the witness until the second day of trial, along with the uncertainty of her whereabouts or availability, we cannot say that the trial court abused its discretion in denying

the motion for continuance, especially in light of the fact that the court permitted the appellant to introduce Ms. Pequeno's grand jury testimony and have it read to the jury. This testimony was clear, supported the appellant's claim of self defense, and was not subject to any cross-examination.

Motion for New Trial

The granting or denying of a motion for new trial lies within the discretion of the trial court. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). When reviewing a trial court's denial of a motion for new trial, we do not substitute our judgment for that of the trial court, but rather we consider whether the trial court's decision was arbitrary or unreasonable. *Id.* Appellant asserts that he was entitled to a new trial because of (1) the trial court's denial of his motion for continuance, a decision he contends constituted error; and (2) the discovery of "new evidence," the live testimony of Ms. Pequeno, which would support his claim of self-defense. Having already determined that the trial court did not err in denying appellant's motion for continuance, we will address only appellant's claim regarding newly discovered evidence.

To be entitled to a new trial based on newly discovered evidence, appellant must first show that there is, in fact, new evidence, both competent and material to the case, the existence of which was unknown to appellant at the time of trial. *See Jones v. State*, 711 S.W.2d 35, 36 (Tex. Crim. App. 1986). Second, appellant must show that the failure to discover such evidence before trial, or to utilize the evidence, once discovered, at the time of trial, was not

a result of any lack of diligence. *See id.* Appellant has show neither.

It is undisputed that the appellant knew of the existence of Ms. Pequeno before the trial and knew the substance of her testimony. Furthermore, despite appellant's reliance on assurances made by Ms. Pequeno that she would appear at the trial, the fact remains that the appellant failed to secure a subpoena for Ms. Pequeno until the second day of trial. These factors undermine appellant's complaint that he was entitled to a new trial based on newly discovered evidence. Likewise, under these circumstances, we can not possibly conclude that the trial court's decision was arbitrary or unreasonable. We hold that the trial court did not abuse its discretion in refusing to grant the appellant a new trial.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed August 5, 1999.

Panel consists of Justices Yates, Fowler and Frost.

Do Not Publish – Tex. R. App. P. 47.3(b).

APPENDIX 2

Motion for Rehearing Overruled; Opinion filed August 5, 1999, Withdrawn; Affirmed and Substitute Opinion filed December 16, 1999

In The
Fourteenth Court of Appeals

NO. 14-97-01292-CR

AMADOR CESARIO RODRIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 734,893

OPINION ON REHEARING

Appellant's motion for rehearing is overruled. This court's opinion of August 5, 1999, is withdrawn, and this opinion is issued in its place.

This is an appeal of a murder case tried to a jury. Appellant, Amador Cesario Rodriguez, complains that the trial court erred in denying his motion for continuance and motion for new trial, both of which were based on the failure of a key but unsubpoenaed witness to appear at trial. Appellant also complains that the denial of his motion for continuance and motion for new trial violated his right to due course of law under the state constitution and due process of law under the federal constitution. We affirm.

Background Facts

Appellant went to a Houston nightclub with a friend, where he met Candy Pequeno and Monica Garza. Appellant left the club alone around 1:45 a.m. and proceeded to his car. On the way to his car, he saw Ms. Pequeno and Ms. Garza standing nearby and agreed to give them a ride to their car, which was in a restaurant parking lot across the street. After the three of them arrived by car in the restaurant's parking lot, appellant began arguing with the occupants of a red *Escort*, driven by the complainant, Charles Haywood. In Mr. Haywood's car were his friends, Jermaine and Maria McFadden, who were in the back seat, and Eddie Kelly, who was in the front passenger seat. The parking lot argument eventually escalated to the point that appellant pulled out a twelve gauge shotgun he kept in the car and fired at Mr. Haywood's car. The shot killed Mr. Haywood and injured Mr. McFadden. After the shooting, appellant fled the scene. Shortly thereafter, the Houston police arrested him.

At his murder trial, appellant claimed that the passengers of Mr. Haywood's car were waving a gun, prompting him to shoot in self-defense. All three of the passengers in Mr. Haywood's car denied that any of them had a gun on the night of the shooting. To establish his defense, appellant relied on his own testimony. He also intended to present the live testimony of Ms. Pequeno, one of the passengers in his car the night of the shooting, who earlier had testified before the grand jury that she saw the occupants of the red *Escort* waving a gun at appellant's car. Ms. Pequeno had cooperated with appellant's counsel in pretrial proceedings and had agreed to

testify for appellant at trial. Because she had demonstrated reliability by appearing for all three previous trial settings, appellant relied on Ms. Pequeno to appear at trial voluntarily and did not arrange for a subpoena to compel her attendance. When the trial began, however, Ms. Pequeno was nowhere to be found.

On the second day of the trial, which was a Tuesday, Ms. Pequeno still had not appeared, nor had appellant determined her whereabouts. At that point, appellant's counsel secured a subpoena for her attendance at trial but was unable to locate her for service. Following appellant's testimony on Thursday of the same week, appellant's counsel moved for a continuance until the following Monday, stating that although the defense had not located Ms. Pequeno, they had made contact with her brother, who was helping them look for her. The trial court denied appellant's motion for continuance but gave appellant the option of reopening his case if he located Ms. Pequeno by the next morning. In addition, the trial court allowed appellant, over the State's objection, to read to the jury the testimony that Ms. Pequeno had given before the grand jury shortly after the shooting. By Friday morning, appellant still could not produce Ms. Pequeno or state her whereabouts. With his motion for continuance denied, appellant presented Ms. Pequeno's grand jury testimony to the jury.

The jury found appellant guilty of murder and sentenced him to thirty years' confinement. After the trial was over, appellant finally located Ms. Pequeno. Appellant then moved for a new trial, arguing that by denying the motion for continuance, the trial court deprived him the opportunity to put on favorable testimony from a key

witness, which may have led to a different result. The trial court denied the motion for new trial.

Motion for Continuance

In his first point of error, appellant contends the trial court erred in denying his motion for continuance. The Code of Criminal Procedure provides that a continuance may be granted "when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial began, *which no reasonable diligence could have anticipated*, the applicant is so taken by surprise that a fair trial cannot be had." Tex. Code Crim. Proc. Ann. Art. 29.13 (Vernon 1989) (emphasis added). The granting or denial of a motion for continuance is vested in the sound discretion of the trial court. *See Duhamel v. State*, 717 S.W.2d 80, 83 (Tex. Crim. App. 1986). When reviewing the trial court's denial of a motion for continuance, we examine the circumstances presented to the trial court and determine whether it abused its discretion in denying the motion. *See Heiselbetz v. State*, 906 S.W.2d 500, 517 (Tex. Crim. App. 1995). Where the continuance is requested because of a missing witness, "[i]f the evidence does not indicate a probability that the witness can be secured by a postponement, or if it appears that a continuance due to the absence of the witness would delay the trial indefinitely, the motion may be properly denied." *Varela v. State*, 561 S.W.2d 186, 191 (Tex. Crim. App. 1978).

Because a missing witness is a risk inherent in almost every case, the party seeking to present a witness must exercise reasonable diligence to protect against the possibility that a witness will not appear as promised. Taking

appropriate measures (i.e., arranging for the timely issuance and service of a subpoena to compel the witness's appearance at trial) is especially critical when the witness is material to the case. Failure to take the necessary steps to secure the attendance of a key witness demonstrates a lack of reasonable diligence. Here, appellant argues he was entitled to a continuance notwithstanding his failure to arrange for the issuance of a subpoena for the missing witness because she had appeared voluntarily on prior occasions and had assured him she would be available for trial. While the witness may have led appellant to believe that a subpoena was necessary to secure her attendance, appellant must be held ultimately responsible for his failure to seek compulsory process for a witness as important to his case as Ms. Pequeno, even if she had proved reliable and cooperative in the past.

The uncertainty surrounding Ms. Pequeno's availability to testify at trial also constitutes sufficient grounds for the denial of appellant's motion for continuance. The record does not indicate a probability that Ms. Pequeno could have been secured by a postponement. At the time appellant requested the continuance, he had no knowledge of Ms. Pequeno's whereabouts. In fact, appellant informed the trial court that even Ms. Pequeno's brother did not know where she was. Appellant's counsel's attempts to locate her had proven fruitless and there was no indication that she likely would have been secured if the trial were postponed. Under these circumstances, the trial court acted within its discretion in denying the motion for continuance.

Given appellant's failure to arrange for the issuance of a subpoena on the witness until the second day of trial

and the uncertainty of the witness's whereabouts or availability, we cannot say the trial court abused its discretion in denying the motion for continuance. Furthermore, in light of the fact that the trial court permitted appellant to introduce Ms. Pequeno's grand jury testimony (which was clear, supported appellant's claim of self defense, and was not subject to any cross-examination), appellant had the opportunity to present the missing witness's account to the jury. We find the trial court did not err in denying appellant's motion for continuance. Appellant's first point of error is overruled.

Motion for New Trial

In his second point of error, appellant asserts he was entitled to a new trial because (1) the trial court committed error by denying his motion for continuance; and (2) a material witness was kept from the court by fraud or was intentionally withheld. Having already determined that the trial court did not err in denying appellant's motion for continuance, we will address only appellant's "fraud" claim.

The granting or denying of a motion for new trial lies within the discretion of the trial court. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). When reviewing a trial court's denial of a motion for new trial, we do not substitute our judgment for that of the trial court, but rather, we consider whether the trial court's decision was arbitrary or unreasonable. *See id.*

Although appellant cites subsections (b), (e), and (h) of Texas Rule of Appellate Procedure 21.3 as the basis for his motion for new trial, only the grounds set forth in

subsection (e) are adequately briefed. Grounds not briefed are waived. *See* Tex. R. App. P. 38.1(h). Inasmuch as appellant has failed to provide argument or citations to authorities to support his single reference to rule 21.3(b) and (h), his complaints on these issues are deemed waived.

Turning to appellant's argument under rule 21.3(e), we note that under this provision, a motion for new trial *must* be granted "when a material defense witness has been kept from court by *force, threats, or fraud, or when evidence tending to establish the defendant's innocence has been intentionally destroyed or withheld*, thus preventing its production at trial." Tex. R. App. P. 21.3(e) (emphasis added). The "fraud" provision of this rule contemplates at least two actors – the material witness and one or more persons who keep that witness from court by "force, threats or fraud." *See, e.g., Dedesma v. State*, 806 S.W.2d 928, 934 (Tex. App. – Corpus Christi 1991, pet. ref'd) (interpreting rule 21.3(e)'s predecessor, rule 30(b)(5)). Appellant must show the *State* used "force, threats, or fraud" to prevent the missing witness from appearing at trial. *See id.* In other words, it is incumbent upon appellant to demonstrate that the witness's absence from trial was the result of prosecutorial misconduct.

Despite appellant's reliance on the "fraud" provision of rule 21.3(e), he points to no conduct or action that could be construed as fraud. Appellant does not allege that anyone, much less the State, kept Ms. Pequeno from trial by any form or wrongdoing. Appellant does not allege prosecutorial misconduct of any sort, nor is there anything in the record to suggest that the State precluded Ms. Pequeno from attending the trial by any means of

artifice, trickery, misrepresentation, or other deception of any kind. To the contrary, Ms. Pequeno's affidavit testimony clearly demonstrates that she did not appear at trial because she did not want to so.[1] Absent proof of prosecutorial misconduct, appellant failed to establish entitlement to relief under rule 21.3(e). Therefore, we cannot possibly conclude that the trial court's decision to deny appellant a new trial was arbitrary or unreasonable nor can we find that the trial court abused its discretion in refusing to grant appellant a new trial. Appellant's second point of error is overruled.

Due Process

In his third and fourth points of error, appellant contends the trial court's denial of his motion for continuance and motion for new trial violated his right to due course of law under the state constitution and due process under the federal constitution. According to appellant, the "basic notions of fairness were violated by the trial court refusing to allow appellant to present the most important and crucial evidence to his sole argument of self-defense."

The federal constitution and the state constitution entitle an accused to due process and due course of law, respectively. *See* U.S. Const. Amend. XIV; Tex. Const. art.

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[1] It is undisputed that appellant knew of the existence of Ms. Pequeno before the trial and knew the substance of her testimony. Furthermore, despite appellant's reliance on Ms. Pequeno's assurances that she would appear at trial, the fact remains that appellant failed to secure a subpoena for Ms. Pequeno until the second day of trial.

I, § 19. While the Texas constitution sometimes provides greater protection than the federal constitution, there is no authority holding that due course of law provides greater protection than due process. *See Safari v. State*, 961 S.W.2d 437, 441-42 (Tex. App. – Houston [1st Dist.] 1997, pet. ref'd, untimely filed). Therefore, we consider appellant's state and federal claims together.

The proper procedural due process analysis is two-tiered. *See Ex parte Montgomery*, 894 S.W.2d 324, 327 (Tex. Crim. App. 1995). First, the reviewing court must decide whether a protected liberty or property interest exists. *See id.* (citing *Hewitt v. Helms*, 459 U.S. 460 (1983); *Morrissey v. Brewer*, 408 U.S. 471 (1972)); *Schwenke v. State*, 960 S.W.2d 227, 232 (Tex. App. – Corpus Christi 1997, pet. denied). If this interest exists, the court must ask the second question, which is whether sufficient procedural safeguards ensure that there was no arbitrary interference with the interest. *See id.*

As to the first tier of the procedural due process analysis, a protected interest "may be either a 'core' interest, such as a liberty or vested property right, or an interest that stems from an independent source, such as state law." *Perry v. Sinderman*, 408 U.S. 593, 601 (1972); *Southwest Airlines Co. v. Texas High-Speed Rail Authority*, 867 S.W.2d 154, 159 (Tex. App. – Austin 1992, no writ). The right to compulsory process is a core interest of due process law. *See Washington v. Texas*, 388 U.S. 14, 19 (1967). This right is defined as " 'the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.' " *Coleman v. State*, 966 S.W.2d 525, 527 (Tex. Crim. App. 1998) (quoting *Washington*, 388 U.S.

at 19). Therefore, appellant's right to present evidence in his favor is a core interest.

Next, we must determine whether sufficient procedural safeguards ensure there is no arbitrary interference with the interest. In light of the fact that the trial court gave appellant the opportunity to present his defense through Ms. Pequeno's grand jury testimony, we question whether there was any interference at all. Notably, appellant does not contend that his subpoena power for obtaining witnesses in his favor was in any way abridged. In fact, he admits he elected not to arrange for issuance of a subpoena on Ms. Pequeno, opting instead to rely on her promise to appear. The fact that appellant's reliance proved to be misplaced does not constitute interference with his right to compulsory process. In any event, the notice and the opportunity to be heard at the hearings for appellant's motion for continuance and motion for new trial were sufficient procedural safeguards to protect appellant's liberty interest.[2]

Additionally, appellant's due process claim fails because he did not preserve error. When there is no record that a due process claim was ever presented to the trial court, the error is not preserved for complaint on appeal. *See Saucedo v. State*, 795 S.W.2d 8, 9 (Tex. App. – Houston [14th Dist.] 1990, no pet.). *See also Belt v. Commission for Lawyer Discipline*, 970 S.W.2d 571, 574 (Tex. App. – Dallas 1997, no pet.) (finding constitutional claims are waived when not presented to the trial court); *Hernandez*

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[2] Deprivation of a protected interest requires notice and an opportunity to be heard. *See Schwenke v. State*, 960 S.W.2d at 233.

v. State Bar of Texas, 812 S.W.2d 75, 78 (Tex. App. – Corpus Christi 1991, no pet.) (finding constitutional claims are waived when not presented to the trial court); Tex. R. App. P. 52(a). Because appellant did not present his due process arguments to the trial court, they were waived. Accordingly, we overrule appellant's third and fourth points for two independent reasons: (1) sufficient procedural safeguards ensured that there was no arbitrary interference with appellant's liberty interest, and (2) appellant failed to preserve error.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed December 16, 1999

Panel consists of Justices Yates, Fowler and Frost.

Publish – Tex. R. App. P. 47.3(b).

APPENDIX 3

Motion for Rehearing Overruled; Opinion filed December 16, 1999, Withdrawn; Affirmed and Substitute Opinion filed May 11, 2000

In The
Fourteenth Court of Appeals

NO. 14-97-01292-CR

AMADOR CESARIO RODRIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 734,893

OPINION ON REHEARING

Appellant's motion for rehearing is overruled. This court's opinion of December 16, 1999, is withdrawn, and this opinion is issued in its place.

INTRODUCTION

This is an appeal of a murder case tried to a jury. Appellant, Amador Cesario Rodriguez, complains that the trial court erred in denying his motion for continuance and motion for new trial, both of which were based on the failure of a key but unsubpoenaed witness to appear at trial. Appellant also complains that the denial of his motion for continuance and motion for new trial violated his right to due course of law under the state

constitution and due process of law under the federal constitution. We affirm.

Background Facts

Appellant went to a Houston nightclub with a friend, where he met Candy Pequeno and Monica Garza. Appellant left the club alone around 1:45 a.m. and proceeded to his car. On the way to his car, he saw Ms. Pequeno and Ms. Garza standing nearby and agreed to give them a ride to their car, which was in a restaurant parking lot across the street. After the three of them arrived by car in the restaurant's parking lot, appellant began arguing with the occupants of a red *Escort*, driven by the complainant, Charles Haywood. In Mr. Haywood's car were his friends, Jermaine and Maria McFadden, who were in the back seat, and Eddie Kelly, who was in the front passenger seat. The parking lot argument eventually escalated to the point that appellant pulled out a twelve gauge shotgun he kept in the car and fired at Mr. Haywood's car. The shot killed Mr. Haywood and injured Mr. McFadden. After the shooting, appellant fled the scene. Shortly thereafter, the Houston police arrested him.

At his murder trial, appellant claimed that the passengers of Mr. Haywood's car were waving a gun, prompting him to shoot in self-defense. All three of the passengers in Mr. Haywood's car denied that any of them had a gun on the night of the shooting. To establish his defense, appellant relied on his own testimony. He also intended to present the live testimony of Ms. Pequeno, one of the passengers in his car the night of the shooting, who earlier had testified before the grand jury that she

saw the occupants of the red *Escort* waving a gun at appellant's car. Ms. Pequeno had cooperated with appellant's counsel in pretrial proceedings and had agreed to testify for appellant at trial. Because she had demonstrated reliability by appearing for all three previous trial settings, appellant relied on Ms. Pequeno to appear at trial voluntarily and did not arrange for a subpoena to compel her attendance. When the trial began, however, Ms. Pequeno was nowhere to be found.

On the second day of the trial, which was a Tuesday, Ms. Pequeno still had not appeared, nor had appellant determined her whereabouts. At that point, appellant's counsel secured a subpoena for her attendance at trial but was unable to locate her for service. Following appellant's testimony on Thursday of the same week, appellant's counsel moved for a continuance until the following Monday, stating that although the defense had not located Ms. Pequeno, they had made contact with her brother, who was helping them look for her. The trial court denied appellant's motion for continuance but gave appellant the option of reopening his case if he located Ms. Pequeno by the next morning. In addition, the trial court allowed appellant, over the State's objection, to read to the jury the testimony that Ms. Pequeno had given before the grand jury shortly after the shooting. By Friday morning, appellant still could not produce Ms. Pequeno or state her whereabouts. With his motion for continuance denied, appellant presented Ms. Pequeno's grand jury testimony to the jury.

The jury found appellant guilty of murder and sentenced him to thirty years' confinement. After the trial

was over, appellant finally located Ms. Pequeno. Appellant then moved for a new trial, arguing that by denying the motion for continuance, the trial court deprived him the opportunity to put on favorable testimony from a key witness, which may have led to a different result. The trial court denied the motion for new trial.

Motion for Continuance

In his first point of error, appellant contends the trial court erred in denying his motion for continuance. The Code of Criminal Procedure provides that a continuance may be granted "when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial began, *which no reasonable diligence could have anticipated*, the applicant is so taken by surprise that a fair trial cannot be had." Tex. Code Crim. Proc. Ann. Art. 29.13 (Vernon 1989) (emphasis added). The granting or denial of a motion for continuance is vested in the sound discretion of the trial court. *See Duhamel v. State*, 717 S.W.2d 80, 83 (Tex. Crim. App. 1986). When reviewing the trial court's denial of a motion for continuance, we examine the circumstances presented to the trial court and determine whether it abused its discretion in denying the motion. See *Heiselbetz v. State*, 906 S.W.2d 500, 517 (Tex. Crim. App. 1995). Where the continuance is requested because of a missing witness, "[i]f the evidence does not indicate a probability that the witness can be secured by a postponement, or if it appears that a continuance due to the absence of the witness would delay the trial indefinitely, the motion may be properly denied." *Varela v. State*, 561 S.W.2d 186, 191 (Tex. Crim. App. 1978).

Because a missing witness is a risk inherent in almost every case, the party seeking to present a witness must exercise reasonable diligence to protect against the possibility that a witness will not appear as promised. Taking appropriate measures (i.e., arranging for the timely issuance and service of a subpoena to compel the witness's appearance at trial) is especially critical when the witness is material to the case. Failure to take the necessary steps to secure the attendance of a key witness demonstrates a lack of reasonable diligence. Here, appellant argues he was entitled to a continuance notwithstanding his failure to arrange for the issuance of a subpoena for the missing witness because she had appeared voluntarily on prior occasions and had assured him she would be available for trial. While the witness may have led appellant to believe that a subpoena was necessary to secure her attendance, appellant must be held ultimately responsible for his failure to seek compulsory process for a witness as important to his case as Ms. Pequeno, even if she had proved reliable and cooperative in the past.

The uncertainty surrounding Ms. Pequeno's availability to testify at trial also constitutes sufficient grounds for the denial of appellant's motion for continuance. The record does not indicate a probability that Ms. Pequeno could have been secured by a postponement. At the time appellant requested the continuance, he had no knowledge of Ms. Pequeno's whereabouts. In fact, appellant informed the trial court that even Ms. Pequeno's brother did not know where she was. Appellant's counsel's attempts to locate her had proven fruitless and there was no indication that she likely would have been secured if

the trial were postponed. These circumstances do not present compelling grounds for a continuance.

Given appellant's failure to arrange for the issuance of a subpoena on the witness until the second day of trial and the uncertainty of the witness's whereabouts or availability, we cannot say the trial court abused its discretion in denying the motion for continuance. Furthermore, in light of the fact that the trial court permitted appellant to introduce Ms. Pequeno's grand jury testimony (which was clear, supported appellant's claim of self defense, and was not subject to any cross-examination), appellant had the opportunity to present the missing witness's account to the jury. We find the trial court did not err in denying appellant's motion for continuance. Appellant's first point of error is overruled.

Motion for New Trial

In his second point of error, appellant asserts he was entitled to a new trial because (1) the trial court committed error by denying his motion for continuance; and (2) a material witness was kept from the court by fraud or was intentionally withheld, providing him grounds for relief under the Texas Rule of Appellate Procedure 21.3(e). Having already determined that the trial court did not err in denying appellant's motion for continuance, we will address only appellant's rule 21.3(e) claim.[1]

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[1] Although appellant referred to rule 21.3(b), (e), and (h) in his brief, he has informed this court that he is not relying on subsections (b) or (h) and that his argument is limited to subsection (e).

The granting or denying of a motion for new trial lies within the discretion of the trial court. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). When reviewing a trial court's denial of a motion for new trial, we do not substitute our judgment for that of the trial court, but rather, we consider whether the trial court's decision was arbitrary or unreasonable. *See id.*

Under rule 21.3(e), a motion for new trial *must* be granted "when a material defense witness has been kept from court by force, threats, or *fraud*, or when evidence tending to establish the defendant's innocence has been intentionally destroyed or withheld, thus preventing its production at trial." Tex. R. App. P. 21.3(e) (emphasis added). The "fraud" provision of this rule contemplates at least two actors – the material witness and one or more persons who keep that witness from court by fraud. *See, e.g., Dedesma v. State*, 806 S.W.2d 928, 934 (Tex. App. – Corpus Christi 1991, pet. ref'd) (interpreting rule 21.3(e)'s predecessor, rule 30(b)(5) when the state allegedly prevented a material witness from appearing at trial). It is incumbent upon a defendant relying on this provision to show that acts or omissions constituting fraud prevented the missing witness from appearing in court. Here, appellant points to no conduct or action that could be construed as fraud.[2] Instead, he focuses on Ms. Pequeno's undisputed absence from trial. Notably, appellant does not allege that anyone kept Ms. Pequeno from trial by

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[2] Appellant relied exclusively on "fraud" as grounds for a new trial under 21.3(e); he did not allege in the lower court, nor does he assert on appeal that Ms. Pequeno was kept from court by "force" or "threats."

any form or wrongdoing; nor is there anything in the record to suggest that the state or anyone else prevented Ms. Pequeno from attending the trial by any means of artifice, trickery, misrepresentation, or other deception of any kind. To the contrary, Ms. Pequeno's affidavit testimony clearly demonstrates that she did not appear at trial because she did not want to so.[3] The underlying rationale for the "fraud" provision of rule 21.3(e) is to provide relief in those rare instances in which a material defense witness is deceived or tricked into not appearing in court. The rule has no application in cases such as this in which the witness was not deceived, tricked or otherwise defrauded but *chose* not to appear.

Appellant also argues that "a material defense witness [Ms. Pequeno] . . . was intentionally withheld." However, there is no evidence in the record to support this factual assertion.[4]

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[3] It is undisputed that appellant knew of the existence of Ms. Pequeno before the trial and knew the substance of her testimony. Furthermore, despite appellant's reliance on Ms. Pequeno's assurances that she would appear at trial, the fact remains that appellant failed to secure a subpoena for Ms. Pequeno until the second day of trial.

[4] To the extent appellant is referring to the provision in rule 21.3(e) that entitles a defendant to a new trial upon a showing that "evidence tending to establish the defendant's innocence has been intentionally . . . withheld," his argument fails. This record does not support a finding that Ms. Pequeno "intentionally withheld" evidence within the meaning of rule 21.3(e). To the contrary, the record shows that she not only gave a detailed and sworn account of the events in question to the grand jury, but also voluntarily communicated with the defense about the evidence she possessed. Appellant's real complaint is not that Ms. Pequeno withheld evidence but that she withheld

Absent proof that Ms. Pequeno was kept from the court by fraud, or intentionally withheld, appellant failed to establish entitlement to relief under rule 21.3(e). Therefore, we can not [sic] conclude that the trial court's decision to deny appellant a new trial was arbitrary or unreasonable. The trial court did not abuse its discretion in refusing to grant appellant a new trial. Appellant's second point of error is overruled.

Due Process

In his third and fourth points of error, appellant contends the trial court's denial of his motion for continuance and motion for new trial violated his right to due course of law under the state constitution and due process under the federal constitution. According to appellant, the "basic notions of fairness were violated by the trial court refusing to allow appellant to present the most important and crucial evidence to his sole argument of self-defense."

The federal constitution and the state constitution entitle an accused to due process and due course of law,

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her presence at trial. Mere failure of a witness to voluntarily appear for trial does not constitute "intentional withholding of evidence" under rule 21.3(e). Furthermore, to obtain relief under this provision, the defendant must demonstrate that the "intentional withholding" prevented the production of the evidence at trial. *See* Tex. R. App. P. 21.3(e). Ms. Pequeno's grand jury testimony was presented at trial; thus, even if appellant had made the treshold showing that evidence was intentionally withheld, he still would not have been entitled to a new trial because there is nothing in the record to establish that production of the evidence was prevented.

respectively. *See* U.S. Const. Amend. XIV; Tex. Const. art. I, § 19. While the Texas constitution sometimes provides greater protection than the federal constitution, there is no authority holding that due course of law provides greater protection than due process. *See Safari v. State*, 961 S.W.2d 437, 441-42 (Tex. App. – Houston [1st Dist.] 1997, pet. ref'd, untimely filed). Therefore, we consider appellant's state and federal claims together.

The proper procedural due process analysis is two-tiered. *See Ex parte Montgomery*, 894 S.W.2d 324, 327 (Tex. Crim. App. 1995). First, the reviewing court must decide whether a protected liberty or property interest exists. *See id.* (citing *Hewitt v. Helms*, 459 U.S. 460 (1983); *Morrissey v. Brewer*, 408 U.S. 471 (1972)); *Schwenke v. State*, 960 S.W.2d 227, 232 (Tex. App. – Corpus Christi 1997, pet. denied). If this interest exists, the court must ask the second question, which is whether sufficient procedural safeguards ensure that there was no arbitrary interference with the interest. *See id.*

As to the first tier of the procedural due process analysis, a protected interest "may be either a 'core' interest, such as a liberty or vested property right, or an interest that stems from an independent source, such as state law." *Perry v. Sinderman*, 408 U.S. 593, 601 (1972); *Southwest Airlines Co. v. Texas High-Speed Rail Authority*, 867 S.W.2d 154, 159 (Tex. App. – Austin 1992, no writ). The right to compulsory process is a core interest of due process law. *See Washington v. Texas*, 388 U.S. 14, 19 (1967). This right is defined as " 'the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.' " *Coleman v. State*, 966 S.W.2d 525,

527 (Tex. Crim. App. 1998) (quoting *Washington*, 388 U.S. at 19). Therefore, appellant's right to present evidence in his favor is a core interest.

Next, we must determine whether sufficient procedural safeguards ensure there is no arbitrary interference with the interest. In light of the fact that the trial court gave appellant the opportunity to present his defense through Ms. Pequeno's grand jury testimony, we question whether there was any interference at all. Notably, appellant does not contend that his subpoena power for obtaining witnesses in his favor was in any way abridged. In fact, he admits he elected not to arrange for issuance of a subpoena on Ms. Pequeno, opting instead to rely on her promise to appear. The fact that appellant's reliance proved to be misplaced does not constitute interference with his right to compulsory process. In any event, the notice and the opportunity to be heard at the hearings for appellant's motion for continuance and motion for new trial were sufficient procedural safeguards to protect appellant's liberty interest.[5] Accordingly, we overrule appellant's third and fourth points of error.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed May 11, 2000
Panel consists of Justices Yates, Fowler and Frost.
Publish – Tex. R. App. P. 47.3(b).

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[5] Deprivation of a protected interest requires notice and an opportunity to be heard. *See Schwenke v. State*, 960 S.W.2d at 233.

APPENDIX 4

(LOGO) FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

September 9, 1999

RE: Case No. 14-97-01292-CR

Style: Rodriguez, Amador Cesario v. The State of Texas

Please be advised that the Court today, GRANTED appellant's motion to extend time to file motion for rehearing; rehearing received September 1, 1999 is ordered filed.

T. C. Case # 734,893 Mary Jane Gay, Clerk

Timothy A. Hootman
PO Box 53452
Houston, TX 77052

APPENDIX 5

(LOGO) FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

September 20, 2000

RE: Case No. 14-97-01292-CR

Style: Rodriguez, Amador Cesario v. The State of Texas

Please be advised that the Court today, GRANTED appellant's motion to extend time to file motion for rehearing; motion for rehearing is ordered filed January 20, 2000.

T. C. Case # 734,893 Mary Jane Gay, Clerk

Timothy A. Hootman
PO Box 53452
Houston, TX 77052-3452

APPENDIX 6

(LOGO) FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

June 15, 2000

RE: Case No. 14-97-01292-CR

Style: Rodriguez, Amador Cesario v. The State of Texas

Please be advised that the Court today, GRANTED appellant's motion to extend time to file motion for rehearing; motion for rehearing is ordered filed June 15, 2000.

T. C. Case # 734,893 Ed Wells, Clerk

Timothy A. Hootman
PO Box 53452
Houston, TX 77052-3452

APPENDIX 7

(LOGO) FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

July 6, 2000

RE: Case No. 14-97-01292-CR

Style: Rodriguez, Amador Cesario v. The State of Texas

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

T. C. Case # 734,893 Ed Wells, Clerk

Timothy A. Hootman
PO Box 53452
Houston, TX 77052-3452

APPENDIX 8

(LOGO) FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

August 7, 2000

RE: Case No. 14-97-01292-CR

Style: Rodriguez, Amador Cesario v. The State of Texas

Appellant's Petition For Discretionary Review was received and filed on this date. Record will be forwarded to the Court of Criminal Appeals on the 30th day in compliance with T.R.A.P. 50.

T. C. Case # 734,893 Ed Wells, Clerk

Timothy A. Hootman
PO Box 53452
Houston, TX 77052-3452

APPENDIX 9

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

(Sep. 12, 2000)

September 11, 2000

COA #: 14-97-01292-CR

RE: Case No. 1538-00

Style: Rodriguez, Amador Cesario

I have this day received and filed the Appellants petition for discretionary review

Troy C. Bennett, Jr., Clerk
Timothy A. Hootman
PO Box 53452
Houston, TX 77052

APPENDIX 10

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

(Nov. 22, 2000)

November 22, 2000

COA #: 14-97-01292-CR

RE: Case No. 1538-00

Style: Rodriguez, Amador Cesario

On this day, the Appellants Petition for Discretionary Review has been REFUSED

Timothy A. Hootman
PO Box 53452
Houston, TX 77052